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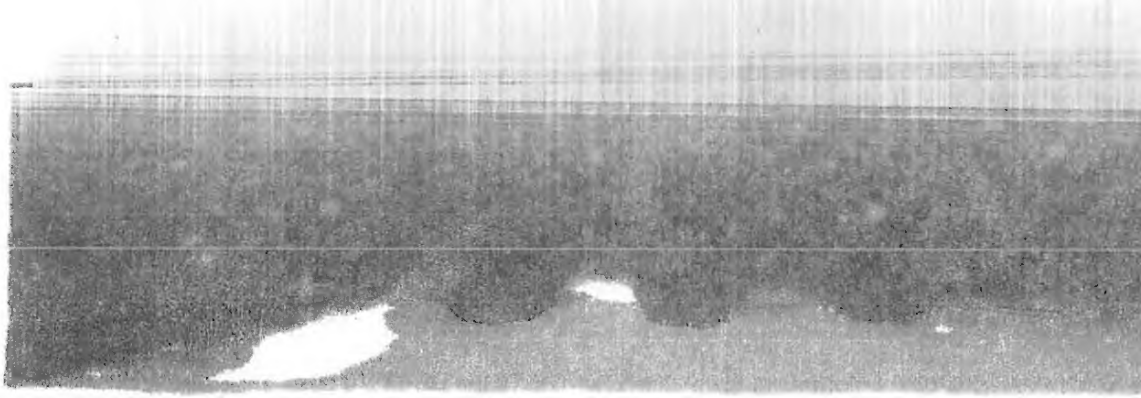

# WHEN YOU CAN—AND CAN'T—BAD-MOUTH A COLLEAGUE

"Engage the brain before putting the mouth in motion" when you criticize a fellow physician, warns this attorney. His personal experience suggests ways to avoid a libel or slander suit.

By Henry B. Alsobrook Jr., J.D.

Doctors today are more inclined to bad-mouth their colleagues than ever before. I believe it's largely an unhealthy trend. Indiscreet criticism of one physician by another has all too often led to groundless malpractice litigation. On the other hand, you shouldn't be afraid to be candid at the peer review meetings of your hospital staff, medical society, or state licensing board. But how much sounding off can you do without winding up on the losing end of a libel or slander suit?

I reluctantly became something of an authority on the question two years ago, when a doctor sued me for defamation of character. So I think I can offer some helpful advice.

The lawsuit against me grew out of a medical-malpractice trial in which a general practitioner testified as an expert witness that the cardiologist I was defending had negligently botched a femoral arteriogram. But in cross-examining the GP, I got him to admit that he'd never done a femoral arteriogram and that he couldn't even identify the needles and catheters commonly used to perform the procedure. The implication, which didn't escape the jury, was that the man had exaggerated his expertise.

Criticism that harms a physician's professional reputation enough to prevent others from dealing with him or her may be categorized as defamatory. Normally, defamation is a violation of civil law—called slander if done orally, libel if published or broadcast. But context is crucial when it comes to besmirching a person's character.

Damaging statements are sometimes "privileged" by law, so the speaker or writer can be immune from liability for them. Court testimony is one such context. Under oath, assuming that you had some reasonable basis for your opinion, you could call a surgeon a "butcher" and not have to worry about a slander suit arising from the remark.

Without any foundation for the comment, though, the judge might consider it sufficiently inflammatory to declare a mistrial. Or the

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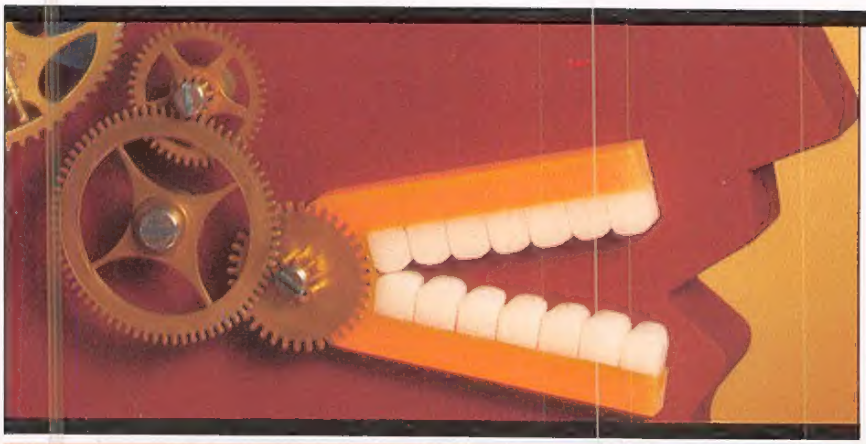

I hadn't meant to assassinate the GP's character. But good intentions alone are no excuse from liability for defamation.

comment could cost your side the case.

That brings up the main exception to the prohibition against defamatory statements: truth. True statements, as well as opinions that rest on specified facts, are protected by the Constitution. Anyone can make them, no matter what the context. In one widely publicized series of medical-malpractice trials, the judge himself, based on the evidence, labeled the defendant orthopedist "a monster feeding on human flesh." If this extremely strong, metaphorical language hadn't been at least partly supported by the facts, the judge's opinion might well have been reversed on the appeal it helped to provoke.

My own experience is a good example of the interplay between context and truth in a defamation case. The "expert" GP filed no charges against me for having made him look silly on the witness stand. But months later I cited that episode while speaking to a group of physicians about the dos and don'ts of courtroom behavior. Clearly, the lecture hall wasn't a privileged context.

Since some members of the audience undoubtedly knew the GP, I decided to spare him needless embarrassment and not identify him during the talk. Afterward, however, a doctor from his town said to me privately, "I bet I know who you were talking about." He then named the GP. I replied, "Just remember you said that, and not me."

This same doctor weeks later was sitting next to a judge at a Kiwanis club luncheon (I wasn't there), and apparently the GP was mentioned as someone who had testified in numerous malpractice trials. The doctor repeated to the judge what I'd said in my speech. Unbeknown to either of them, the GP's brother was seated at the same table, taking in the entire conversation. That's how the suit against me began.

It ended with both trial and appellate courts ruling that I hadn't defamed the GP directly or indirectly. The key element in those decisions was that my remarks had been true, as proved by the transcript of the original malpractice case. The context in which I'd spoken—while giving me no immunity—was also important. It indicated that I'd been critical of the man for an educational purpose, rather than out of maliciousness or a deliberate effort to harm.

The absence of malice—as you might recall from the movie that took the phrase for its title—can be an effective defense against a defamation claim by a public official or "public figure" (which I'll come back to later). That's what

gets comedians off the hook for their outrageously false assertions in a celebrity "roast," for example. From the context, everyone understands that humor, not harm, is intended.

It's worth noting too that you can defame a person without actually naming him when you make it apparent whom you're talking about. Leaving the GP's name out of my speech was an indication to the court that I hadn't meant to assassinate his character. While good intentions alone won't excuse anyone from liablity for defamation in a non-privileged context, they don't hurt.

Now, let's see how the same principles apply to various situations in which you're apt to find yourself. Peer review activities, for instance, are analogous to court proceedings in that state laws normally protect the participants from defamation charges. Although the degree and extent of immunity differ from one state to the next, medical staff credentialing, quality assurance, and disciplinary processes are all frequently covered. This privilege is crucial because courts have ruled that, without it, the maligning of a professional's qualifications can be "actionable per se." In other words, the defamed person doesn't have to show any actual monetary loss due to the libel or slander in order to collect for damages, since the court assumes that these have been inflicted.

Thus, acting without malice, you can safely recommend that another physician's application for hospital privileges be denied; question a colleague's competence at a staff meeting devoted to analyzing failures in patient care; or report a physician you believe may be impaired by drugs, alcohol, or illness. Statutory privilege may not keep you from being sued by the person you criticize, but it will almost certainly prevent him or her from winning.

I say "almost" because, as this magaine reported recently, the courts haven't uniformly rejected the defamation claims of doctors whose privileges have been denied, curtailed, or revoked. In one exceptional Illinois case,* during a medical staff executive committee meeting the head of an OBG audit committee purportedly called another obstetrician "totally unethical and dishonest" and used some raunchy expletives to describe his clinical skills. The target of those alleged barbs sued his detractor, demanding $9 million in damages. The trial judge dismissed the suit on the grounds that state law gave absolute immunity to all remarks made in the peer review setting. But a state appeals court overturned that decision, ruling that doctors who appear before peer review committees have no absolute privilege to defame their colleagues.

The plaintiff M.D. in the case ultimately collected $150,000 through an out-of-court settlement, presumably because the defendant's defamatory statements appeared quite malicious without solid evidence to back them up. But this shouldn't inhibit you from finding fault with a colleague when appropriate. Along with the privilege to speak up with no fear of legal reprisal comes the obligation to do so if you think that one of your colleagues can't adequately care for his patients.

Failure to report the incompetence—or worse yet, covering it up via a positive letter of recommendation that allows the doctor to land a staff appointment in another town—would leave you wide open for a negligence suit if he or she subsequently hurt a patient.

The Illinois defamation case can serve as a reminder to choose your words carefully so they conform to the facts, much as you would when recording the findings of a physical examination on a patient's chart.

For instance, suppose someone tells you that Joe the internist is addicted to drugs. You then pay more attention to Joe than usual and notice some peculiar behavior. The proper course of action would be for you to convey your observations to his department chief, the credentials committee, or the medical society's impaired-doctor program, sticking strictly to what you know: "A friend told me that Joe has been taking his own medicine. From what I've seen, he talks too rapidly, perspires excessively, and has the shakes. Maybe someone should check into it."

That way, even if your assump-

*See "Can You Really Speak Your Mind in Peer Review?" MEDICAL ECONOMICS FOR SURGEONS. February 1984.

As in peer review, communication between you and patients can also lose its privileged status due to injudicious criticism.

tions about him are dead wrong, Joe isn't likely to sue you, and he surely wouldn't prevail if he did. Your words were truthful, even to the point of labeling the hearsay for what it was, and they were probably privileged. As the context shows, too, your comments were aimed at helping him and protecting patients.

In contrast, consider the legally perilous scenario a physician could set in motion by jumping to conclusions and sharing them in the doctors' lounge: "Hey, Mort, have you heard that Joe's a junkie? Maybe that explains why he's so lousy at differential diagnosis."

That doctor would be virtually begging for a slander suit. His defamatory and unprofessional accusations would have no objective, factual foundation. Moreover, the context—certainly not a privileged one—would strongly suggest malice since vicious gossip could hardly be expected to benefit Joe or anyone else.

Similarly, if you're a member of a peer review committee of any type, you should be very careful not to indulge in gossip about its deliberations or findings. Let's say you've been appointed to an ad hoc investigative team to help determine whether Dr. Smith—who's up in age and perhaps having problems in the operating room—should be removed from the hospital staff. Your friends ask how things are going. Since you've always confided in them, the natural inclination may be to answer: "Well, Smitty's finally going to get the ax. In seven operations this year alone, I discovered, he . . ."

So the rumors start to fly, Dr. Smith's referrals evaporate, he learns who's been blabbing, and then the ax falls. Convinced that his right to a fair hearing has been abridged, he sues the hospital and its medical staff. The court restores his privileges because the evidence gathered by you—a far from impartial investigator—must be discounted as tainted.

Next, Dr. Smith hits you with a defamation claim. Your immunity vanished back when you began hashing over his case in an unofficial context. I can hear his lawyer now: "Doctor, why would you want to talk about Dr. Smith that way, spreading those malignant rumors, if it wasn't to ruin his reputation?"

Beyond peer review, there's another kind of communication—between you and patients—that can lose its privileged status due to an injudicious criticism. Most of the time, of course, the words exchanged by a doctor and patient are completely confidential. But they may not remain so if you make a crack along the lines of,

"Mrs. Carstairs, I can't understand why your former physician, Dr. Ralph, prescribed that medication for you. Because of it, your hypertension got worse instead of better. And that may be why you had that little stroke."

Consequently, Mrs. Carstairs goes to a lawyer, the lawyer goes to court, the confidentiality privilege goes out the window, and soon you're subpoenaed as the plaintiff's expert in a malpractice action. Which may be all well and good, but only if you're prepared to swear under oath that Dr. Ralph, your competitor, had screwed up.

On the other hand, suppose that when deposition time rolls around you suddenly realize that you were a victim of Loose Tongue Syndrome. "I'm very sorry I said that," you might apologize. "I didn't really mean it, and it just wasn't true." At that point, you're in the position of having admitted to a malicious lie. Chances are that Mrs. Carstairs would put an end to the matter by dropping her suit. However, Dr. Ralph could still be angry enough to file one of his own.

Finally, let's examine a couple of non-privileged situations in which the urge to lambaste someone may be irresistible. For instance, I know of an oncologist who—under pressure from a hospital administrator to bring in more patients—publicized his modest research progress against lung carcinoma as if he'd found the cure.

Shortly afterward, an internist took him to task in the county medical society's bulletin. Not using the oncologist's name—but leaving no doubts concerning the person he was talking about—the internist argued that such publicity-seeking was immoral because it gave false hopes to desperate patients. To sharpen his point, he included the names of two infamous quacks in the title of his essay. Could that be construed as libel?

I doubt it. Although the oncologist was unmistakably identified, the internist's opinion of him was based on fact and therefore constitutionally protected. (If the case had gone to court, however, he might have needed the testimony of a candid administrator or a desperate patient to prove the facts.)

The context also implied that the internist was trying to do society a favor by revealing a huckster, which could have been pertinent because the oncologist had thrust himself into the public spotlight to begin with. So a court might have considered the oncologist a "public figure" for the purpose of deciding whether he'd been libeled. Such people (others are those who have easy access to the news media, as well as most public officials) bear a higher-than-usual standard of proof in defamation cases. They're required to show that their critics harbored actual malice toward them, which the courts have defined as "knowledge of falsity or reckless disregard for the truth."

The higher standard notwithstanding, there are still pitfalls to avoid, as this last example shows:


**"It's hard to understand why TV can be such a wasteland when they use so much fertilizer."**

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Assume that the medical staff and trustees of your hospital are at odds over the institution's opening of a large outpatient clinic. You've just learned to tolerate its slow draining of patients from your practice when the administration's marketing and public relations arm initiates a media blitz to promote the facility. The angry rumblings in any medical community are quickly picked up by the local newspaper, and a reporter phones to get your opinion.

The next day, you see that one of your comments has been printed: "Well, I think the hospital has turned into a leech that's sucking the life's blood out of private practice." Is this libel or slander?

Possibly. While you've got a right to express your opinion, it has some factual basis, and the hospital might conceivably be deemed a "public figure," a jury could decide against you. To those six or 12 lay people—not renowned for sympathy toward physicians in financial matters—your strong language could have a malicious ring, as could the context of self-interest. After all, the hospital would surely contend that its clinic was designed as a public service to provide quality medical care at prices perhaps lower than yours.

So, if you're about to disparage anyone severely, first ask yourself three questions: Is what I plan to say based on the truth? Is this the right place to say it? Can any good come from it? Or as the old saw goes, engage the brain before putting the mouth in motion. ■